United Nations A/57/769

General Assembly

Distr.: General
31 March 2003

Original: English

Fifty-seventh session
Agenda item 109 (b)
Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Report of the Secretary-General on Khmer Rouge trials

Summary

Representatives of the Secretary-General and Cambodia have negotiated and elaborated a text of a draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea. The draft agreement provides for the establishment of Extraordinary Chambers in the national courts of Cambodia, established and operated with international assistance. The Chambers would have jurisdiction to try senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

The Secretary-General considers the draft agreement a considerable improvement over the draft that had been under discussion during his previous negotiations with the Government of Cambodia, particularly the provisions on the status of the agreement and its provisions regarding the procedures that would have to be followed in prosecutions and trials. The negotiations which resulted in the elaboration of the text of the draft agreement were protracted and, at times, difficult. There still remains doubt in some quarters regarding the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia. It is, however, the hope of the Secretary-General that the Government, in the implementation of the agreement, would carry out fully the obligations that it would assume. It is worthwhile noting that, under the terms of the draft agreement, any deviation by the Government from the obligations undertaken could lead to the United Nations withdrawing its cooperation and assistance from the process.

The draft agreement has been initialled, so as to indicate that it is the text that the two delegations have elaborated. It is now for the General Assembly to decide whether the United Nations should proceed to conclude an agreement with the Government of Cambodia based upon that draft.

03-30358 (E) 030403

The report also describes the requirements of the Extraordinary Chambers and their associated institutions in terms of funds, equipment, services and personnel. It presents options for financing the assistance that the United Nations would provide under the draft agreement and concludes that assessed contributions are the only mechanism that would be viable and sustainable and that would ensure the early establishment of the Extraordinary Chambers and the prompt commencement of their operations.

I. Introduction

1. The General Assembly, in its resolution 57/228 of 18 December 2002, requested me to resume negotiations, without delay, to conclude an agreement with the Government of Cambodia on the establishment of Extraordinary Chambers within the existing court structure of Cambodia (hereinafter "Extraordinary Chambers") for the prosecution of crimes committed during the period of Democratic Kampuchea.

2. The General Assembly also requested that I submit to it, no later than 90 days from the adoption of the resolution, a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Cambodia concerning the establishment of the Extraordinary Chambers.

3. The General Assembly furthermore requested me to include in my report recommendations for the efficient and cost-effective operation of the Extraordinary Chambers, including the amount of voluntary contributions of funds, equipment and services to the Extraordinary Chambers, inter alia, through the offer of expert personnel, that might be needed from States, intergovernmental organizations and non-governmental organizations.

4. On 17 March 2003, I wrote to the President of the General Assembly, providing him and, through him, the members of the Assembly with an initial, brief report on my negotiations with the Government of Cambodia (A/57/758). In the letter, I stated that I would shortly be submitting a full report to the General Assembly in response to the requests contained in resolution 57/228. The present report is submitted for that purpose.

5. The present report is in five parts. Section II briefly sets out the historical background. Section III consists in an account of the resumed negotiations between the United Nations and the Government of Cambodia that took place following the adoption of resolution 57/228. Section IV explains the provisions of the draft agreement that has been elaborated as a result of those negotiations. Section V describes the steps that would need to be taken for an agreement to be concluded between the United Nations and the Government of Cambodia on the basis of that draft and for that agreement to enter into force. Section VI addresses the practical steps that would need to be taken to implement the draft agreement. In particular, it describes the international assistance that would be needed, in terms of personnel, equipment, services and funds, to permit the early establishment of the Extraordinary Chambers and to sustain their efficient and cost-effective operation. It also contains an assessment of the viability and sustainability of the financial mechanism envisaged by the General Assembly in the resolution, together with an alternative solution for the Assembly's consideration.

II. Background

6. On 21 June 1997, the two Prime Ministers of Cambodia sent a letter to me requesting the assistance of the United Nations in bringing to justice persons responsible for genocide and crimes against humanity committed during the period of Democratic Kampuchea. I transmitted that letter to the Presidents of the General Assembly and of the Security Council on 23 June 1997 (A/51/930-S/1997/488). The General Assembly, in its resolution 52/135 of 12 December 1997, asked me to

examine that request, including the possibility of appointing a group of experts to evaluate the existing evidence and to propose further measures. On 13 July 1998, I appointed a Group of Experts to evaluate the existing evidence, assess the feasibility of bringing Khmer Rouge leaders to justice and explore options for doing so before an international or national jurisdiction. On 15 March 1999, I submitted the report of the Group of Experts to the General Assembly and to the Security Council (A/53/850-S/1999/231). In its report, the Group of Experts recommended the establishment of an international tribunal to try Khmer Rouge officials responsible for crimes against humanity and genocide committed between 17 April 1975 and 7 January 1979. That option was not acceptable to the Government of Cambodia.

7. On 17 June 1999, Prime Minister Hun Sen wrote to me once more, asking the United Nations to provide experts to assist Cambodia in drafting legislation that would provide for a special national Cambodian court to try Khmer Rouge leaders and that would provide for foreign judges and prosecutors to participate in its proceedings. In response to that request, I entered into negotiations with the Government of Cambodia with a view to reaching agreement on how such a court would have to be organized and how it would have to function, if the United Nations was to provide or arrange assistance to help establish it and help it to function. Those negotiations lasted two and a half years. In February 2002, I concluded that I was no longer in a position to continue them.

III. The resumed negotiations

8. The resumption of negotiations between the United Nations and the Government of Cambodia in accordance with General Assembly resolution 57/228 took place in two stages.

A. New York: January 2003

9. The first stage consisted in a series of six exploratory meetings, held at United Nations Headquarters between 6 and 13 January 2003. The Government of Cambodia was represented at those meetings by a delegation led by Mr. Sok An, Senior Minister in charge of the Council of Ministers. The United Nations team was led by Mr. Hans Corell, the Under-Secretary-General for Legal Affairs and Legal Counsel. The purpose of these exploratory meetings was to enable both me and the Government of Cambodia to gain a better understanding of how we each saw the task before us, to ascertain areas of common ground and to identify the issues that would need to be resolved in the negotiations that lay ahead.

10. In paragraph 1 of resolution 57/228, the General Assembly specifically mandated me to negotiate to conclude an agreement which would be consistent with the provisions of that resolution. It was my understanding that, to be consistent with the terms of the resolution, any agreement between the United Nations and the Government of Cambodia would have to satisfy the following conditions:

(a) The agreement would have to respect and give concrete effect to the principle that the Extraordinary Chambers are to be national courts, within the existing court structure of Cambodia, established and operated with international assistance;[1]

(b) The agreement would have to ensure that the Extraordinary Chambers have subject-matter jurisdiction consistent with that set forth in Cambodia's Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the "Law") and that they have personal jurisdiction over the senior leaders of Democratic Kampuchea and those who were most responsible for the crimes specified in that Law;[2]

(c) The agreement would have to provide for the existence of an appellate chamber within the Extraordinary Chambers;[3]

(d) The agreement would have to ensure that prosecutions and trials before the Extraordinary Chambers comply with established international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights;[4]

(e) The agreement would have to ensure that the process of prosecution and trial before the Extraordinary Chambers is a credible one, that complies with established international standards regarding the independence and impartiality of the judiciary, the effectiveness, impartiality and fairness of prosecutors and the integrity of the judicial process;[5]

(f) The agreement would have to be so framed that the Extraordinary Chambers can be established as early as possible, begin to function promptly and thereafter operate on a sustained basis and in an efficient and cost-effective manner. Otherwise, the opportunity of bringing to justice those responsible for serious violations of Cambodian and international law during the period of Democratic Kampuchea might soon be lost;[6]

(g) In addition to these six substantive conditions, the General Assembly also laid down a seventh condition, of a more procedural nature: namely, that the agreement would have to be based on previous negotiations that had taken place between the United Nations and the Government of Cambodia;[7]

11. In the light of the above, it was my understanding that resumed negotiations should be based upon, and so take as their point of departure, the draft agreement which had been under discussion during the course of the previous negotiations between the United Nations and the Government of Cambodia, which had come to an end on 8 February 2002.

12. At the same time, it was also my considered view that the General Assembly had given me a clear and unambiguous mandate to negotiate for an agreement that would incorporate certain changes to that draft.

13. Two factors in particular confirmed me in that view. The first was General Assembly resolution 57/225 on the situation of human rights in Cambodia. In that resolution, which it had adopted on the very same day as resolution 57/228, the Assembly "note[d] with concern the continued problems related to the rule of law and the functioning of the judiciary [in Cambodia] resulting from, inter alia, corruption and interference by the executive with the independence of the judiciary".[8] I clearly had to take account of this finding by the General Assembly when it came to implementing paragraph 5 of resolution 57/228. In particular, it was clear to me that, if I was to comply with the terms of the mandate that the General Assembly had given me, I would have to re-examine the draft agreement that had

previously been under discussion and, where necessary, propose adjustments to that draft in order to ensure that the impartiality and independence of the Extraordinary Chambers and the integrity and credibility of their proceedings were fully guaranteed.

14. The second factor was my experience in the previous negotiations with the Government of Cambodia. Throughout those previous negotiations, the Cambodian Government had exhibited a lack of urgency, together with an absence of the active and positive commitment to the process that would be essential when it came to implementing any agreement and to establishing the Extraordinary Chambers, making them operational and ensuring their sustained operation. Indeed, it was this lack of commitment on the part of the Government which had been the main reason why I came to the conclusion, on 8 February 2002, that I was no longer in a position to continue with the previous negotiations. Naturally, I could not ignore this experience when it came to deciding how to give effect to the wish of the General Assembly, reflected in paragraphs 1, 9 and 10 of resolution 57/228, that any agreement regarding the Extraordinary Chambers should facilitate their early establishment and their efficient and expeditious operation.

15. The draft agreement that had been under discussion during the previous negotiations had provided for the Extraordinary Chambers to be structured and organized in a way that was highly complex and which afforded ample scope for obstruction and delay in the conduct of their proceedings. While far from ideal, that structure and organization would nevertheless have been workable if the Government of Cambodia had been fully committed to establishing the Extraordinary Chambers and making them work. It had become evident, though, as the previous negotiations went on, that the commitment of the Government could not be taken for granted. In those circumstances, it was clear to me that the structure and organization of the Extraordinary Chambers would have to be simplified, so as to make it easier to set them up quickly and eliminate obstacles to their expeditious and efficient operation. Otherwise, "the opportunity to bring those responsible to justice" might well be lost and the whole objective of the General Assembly resolution defeated.

16. I accordingly advanced the following proposals during the exploratory meetings that took place in New York:

(a) The agreement should lay down how the Extraordinary Chambers were to be structured and organized and how they were to function, if they were to receive international assistance from the United Nations. If the Government were, at a later date, to change the structure and organization of the Extraordinary Chambers so that they failed to conform with the agreement, or if it were to cause them to function in a manner that did not conform with the terms of the agreement, then the United Nations would reserve the right to cease to provide assistance under the agreement;

(b) The structure of the Extraordinary Chambers, as foreseen during the previous negotiations, should be simplified in a number of respects. This would make it possible to establish the Chambers as early as possible, enable them to begin to function promptly and make their sustained operation more cost-effective and efficient. It would also enhance their credibility, by minimizing the scope for delay in the conduct of investigations, prosecutions and trials. The agreement should accordingly provide for the Extraordinary Chambers and their associated bodies to be structured as follows:

- The Chambers should have a simple two-tier structure, consisting of a Trial Chamber and an Appeals Chamber. The draft that had previously been under discussion had provided for a more complex, three-tier structure, consisting of a Trial Court, an Appeals Court and a Supreme Court;

- The Trial Chamber should be composed of three judges and the Appeals Chamber of five judges. The earlier draft had envisaged five judges in the Trial Court and seven in the Appeals Court;

- There should be one prosecutor and one investigating judge. The earlier draft had envisaged two co-prosecutors and two co-investigating judges;

- There would consequently not be any need for a mechanism to settle disputes between co-prosecutors or between co-investigating judges. The Pre-Trial Chamber, which had originally been envisaged for that purpose, would therefore not be necessary;

- The official working languages of the Extraordinary Chambers should be Khmer, English and French. There should not be any further official working languages;

(c) In order to ensure the impartiality, independence and credibility of investigations, prosecutions and trials, the following adjustments should be made to the draft agreement that had been under discussion during the previous negotiations:

- A majority of judges, both in the Trial Chamber and in the Appeals Chamber, should be international personnel. The earlier draft had provided for Cambodian judges to make up a majority of the bench;

- Decisions of the Chambers should be taken by a simple majority vote. The earlier draft had provided for decisions to be taken by a "supermajority", consisting of a simple majority of the judges, plus one;

- Both the prosecutor and the investigating judge should be international personnel;

(d) In order to ensure conformity with international standards of justice, fairness and due process of law, the agreement should contain the following provisions:

- The Extraordinary Chambers should exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights;

- The rights of the accused enshrined in those articles of the Covenant should at all times be respected, including their right to engage counsel of their own choosing;

- There should be the fullest possible respect for the right of the accused to a fair and public hearing. Representatives of States, the Secretary-General and international and national non-governmental organizations, as well as the news media, should at all times have access to, and be able to observe, the proceedings. This access should only be denied when strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice;

– The procedures to be followed by the Extraordinary Chambers should be those laid down in Cambodian law. At the same time, where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, the Extraordinary Chambers should be able to look to relevant international rules for guidance;

– It should be for the Chambers to decide whether the amnesty that was granted to one person on 14 September 1996 would serve to bar his prosecution or conviction for crimes within their jurisdiction;

(e) Insofar as concerns the jurisdiction of the Extraordinary Chambers, the agreement should provide the following:

– The Chambers should have subject-matter jurisdiction in respect of the crimes set out in chapter II of Cambodia's national Law, as promulgated on 10 August 2001;

– The Chambers should have personal jurisdiction in respect of senior leaders of Democratic Kampuchea and those who were most responsible for the crimes over which the Chambers have subject-matter jurisdiction;

(f) The agreement should contain arrangements regarding the financing of, and assistance to, the Extraordinary Chambers. In particular, it should provide the following:

– Responsibility for the payment of the salaries and emoluments of international personnel should lie with the United Nations;

– Responsibility for the payment of the salaries and emoluments of Cambodian personnel should remain with the Government of Cambodia;

– Responsibility for the operational costs of the Extraordinary Chambers should lie with the United Nations.

17. During the exploratory meetings in New York, the Cambodian team stated that, with one exception (noted below), it firmly rejected my proposals, set out in points (b) and (c) of the previous paragraph, regarding the structure and organization of the Extraordinary Chambers. The Cambodian delegation noted that those proposals would involve changes to the draft agreement that had been under discussion during the previous negotiations. It believed that the United Nations and the Government had reached agreement on those matters in the course of those negotiations. It also believed that the General Assembly resolution required that agreements reached on any points during the course of the previous negotiations should be respected during the resumed negotiations. The Cambodian delegation further stated that the proposals in question were contradictory to Cambodia's Law, as promulgated on 10 August 2001, and that the Government was not prepared to consider any proposals that would require it to make changes to that Law. The only exception was that envisaged in paragraph 4 (b) of the General Assembly resolution, namely, to reduce the number of instances in the Extraordinary Chambers from three to two. The Cambodian delegation added that, in its view, no changes needed to be made to the structure and organization of the Extraordinary Chambers, as conceived in its Law of 10 August 2001, in order to ensure that proceedings before them were credible. That could be done by ensuring compliance with international standards of justice,

fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights.

B. Phnom Penh: March 2003

18. On 13 February 2003, the Permanent Representative of Cambodia to the United Nations delivered to me a letter from Prime Minister Hun Sen, bearing the date 31 January 2003. In the letter, Prime Minister Hun Sen invited me to send a team to Phnom Penh as soon as possible. I wrote back to him the following day, accepting the invitation and informing him of the dates on which my team would be available to travel to Phnom Penh. On 18 February 2003, Prime Minister Hun Sen wrote back to inform me that his Government would be pleased to receive my team on the later of the dates that I had mentioned in my letter.

19. Accordingly, a small United Nations team, led by the Legal Counsel, Hans Corell, visited Phnom Penh from 13 to 17 March 2003. Mr. Corell was accompanied by Lamin Sise, Director for Legal Affairs, Human Rights and Special Assignments, Executive Office of the Secretary-General; Sharon Van Buerle, Special Assistant to the Controller, Office of the Controller, Office of Programme Planning, Budgets and Accounts; David Hutchinson, Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Ellen Alradi, Political Affairs Officer, Asia and Pacific Division, Department of Political Affairs; and Goro Onojima, Human Rights Officer, New York Office, Office of the United Nations High Commissioner for Human Rights. During its five-day visit, the team conducted detailed negotiations on the outstanding issues that had been identified as a result of the exploratory meetings in New York. The team also assessed the adequacy of possible premises for the Extraordinary Chambers and their associated organs and held substantive discussions with senior officials of the Government of Cambodia on the requirements for the Extraordinary Chambers in terms of funds, equipment, services and personnel.

20. It became apparent to me, during my team's visit to Phnom Penh, that the Government of Cambodia was not prepared to contemplate proposals that would require it to make any changes to those provisions of its national Law that specified how the Extraordinary Chambers were to be structured and organized (with the exception of reducing the number of instances from three to two).

21. This was all the more apparent inasmuch as certain Member States that were closely following the resumed negotiations had made it clear to me that they expected me not to seek any changes to the structure and organization of the Extraordinary Chambers that had been contemplated during the earlier negotiations. The Government of Cambodia was obviously aware that this position had been communicated to me and acted accordingly.

22. Nevertheless, I resolved to make a final effort to strengthen the role of the international element at the stages of investigation and prosecution and, at the same time, to simplify those stages of the process by doing away with the Pre-Trial Chamber. I accordingly instructed my team to propose that, in case of any disagreement between the Cambodian co-investigating judge and the international co-investigating judge regarding the conduct of judicial investigations, the views of the international co-investigating judge should be decisive. I made an analogous proposal with respect to the co-prosecutors. However, the reaction of the Cambodian

delegation to these proposals was also negative. My team accordingly concluded that it would not be possible to elaborate a text acceptable to the Cambodian delegation that would include provisions along the lines envisaged.

23. It was clear to me, then, that the only agreement that it would be possible to negotiate with the Government was one that accepted the structure and organization of the Extraordinary Chambers foreseen in Cambodia's Law of 10 August 2001. Consequently, my team continued to negotiate with the Government on the basis that the provisions of the draft agreement dealing with the structure, organization and operation of the Chambers would mirror the relevant provisions of Cambodia's Law, with the exception that the number of instances in the Extraordinary Chambers would be reduced from three to two. On this basis — but only on this basis — it has proved possible for me to elaborate with the Government of Cambodia a text of a draft agreement. The text of that draft agreement is contained in the annex to the present report.

24. That text contains a number of positive elements. In particular, it contains several significant improvements over the text that had been under discussion during the previous negotiations.

25. The first concerns the role of the draft agreement itself. As it is now formulated, that text, if it were to enter into force, would constitute an international agreement between the United Nations and Cambodia, which would fall to be implemented in accordance with the requirements of the law of treaties. Central among these are the principles embodied in articles 26 and 27 of the Vienna Convention on the Law of Treaties: namely, that a treaty must be performed by the parties in good faith (*pacta sunt servanda*) and that the parties may not invoke provisions of their internal law as justification for their failure to perform a treaty. The draft agreement further specifies that it would apply as law within Cambodia. It follows from these provisions that Cambodia would be obligated to ensure that its national law conformed with the agreement and, to the extent that it did not do so, to amend its law in order to make it do so. Thereafter, Cambodia could not amend its national law except in a manner that was consistent with the provisions of the draft agreement. The draft agreement would therefore play the essential role of affording an assurance, binding in international law, that the Extraordinary Chambers would be structured and organized in the manner that it stipulates and that they would function and exercise their powers in accordance with the procedures that it lays down.

26. Secondly, the cumbersome, three-tier structure that had been envisaged for the Extraordinary Chambers during the earlier negotiations has been changed to a simpler, two-instance one.

27. Thirdly, the draft agreement contains a number of provisions regarding the procedures to be followed by the Extraordinary Chambers and the manner in which they would be obliged to exercise their powers that would go much further towards ensuring international standards of justice, fairness and due process than did the provisions of the agreement that had been under discussion during the earlier negotiations. Reference is made in this regard to section IV, D and E, of the present report.

28. That having been said, I cannot but recall the reports of my Special Representative for human rights in Cambodia, who has consistently found there to

be little respect on the part of Cambodian courts for the most elementary features of the right to a fair trial.[9] I consequently remain concerned that these important provisions of the draft agreement might not be fully respected by the Extraordinary Chambers and that established international standards of justice, fairness and due process might therefore not be ensured.

29. Furthermore, in view of the clear finding of the General Assembly in its resolution 57/225 that there are continued problems related to the rule of law and the functioning of the judiciary in Cambodia resulting from interference by the executive with the independence of the judiciary, I would very much have preferred that the draft agreement provide for both of the Extraordinary Chambers to be composed of a majority of international judges. I was, and continue to be, of the view that international judges, who would not be dependent in any way upon the executive authorities of Cambodia, would be much less likely to be influenced by, or yield to, any interference from that quarter. In addition, it would then not have been necessary to apply the problematic "supermajority" formula, which was introduced into the negotiations by Member States, and not by the United Nations delegation. At the same time, the essential nature of the Extraordinary Chambers as a national Cambodian court would have remained unaffected. Many examples exist of national courts which are composed predominantly, or even solely, of foreign judges. They do not thereby cease to be national courts of the State concerned.

30. Doubts might therefore still remain as to whether the provisions of the draft agreement relating to the structure and organization of the Extraordinary Chambers would fully ensure their credibility, given the precarious state of the judiciary in Cambodia. It would, however, be my hope that, were an agreement to be concluded between the United Nations and the Government of Cambodia on the basis of the draft, the Government of Cambodia would fully carry out the obligations that it would thereby assume. It is worthwhile noting in this regard that, under the terms of the draft agreement, any deviation by the Government from its obligations could lead to the United Nations withdrawing its cooperation and assistance from the process. Reference is made in this regard to section IV, F, below.

IV. The draft agreement

A. Nature of the Extraordinary Chambers

31. The legal nature of the Extraordinary Chambers, like that of any legal entity, would be determined by the instrument that created them. In accordance with the draft agreement, the Extraordinary Chambers would be created by the national law of Cambodia. The Extraordinary Chambers would therefore be national Cambodian courts, established within the court structure of that country.

B. Structure and organization of the Extraordinary Chambers

32. The draft agreement envisages a total of five organs. The first are the Extraordinary Chambers themselves.

The Trial Chamber and the Supreme Court Chamber

33. The Extraordinary Chambers would consist of a Trial Chamber and a Supreme Court Chamber. The Trial Chamber would be composed of three Cambodian judges and two international judges. The Supreme Court Chamber would be composed of four Cambodian judges and three international judges. The five international judges would be appointed by Cambodia's Supreme Council of the Magistracy from a list of not less than seven nominees provided by the Secretary-General.

34. Decisions in each Chamber would require the affirmative vote of a majority of the judges of that Chamber, plus one — a so-called "supermajority". A decision therefore could not be taken without the support of at least one international judge.

35. The Supreme Court Chamber would function both as appellate chamber and final instance. The judges of that Chamber would serve only once it was seized with a particular matter.

The co-prosecutors

36. There would be two co-prosecutors: one Cambodian prosecutor and one international prosecutor. The international co-prosecutor would be appointed by Cambodia's Supreme Council of the Magistracy from a list of two nominees that the Secretary-General would provide. The other nominee would be appointed as a reserve international co-prosecutor.

37. The two co-prosecutors would initiate preparatory investigations, formulate charges, cause the opening of judicial inquiries and, where those inquiries led to an accused being committed for trial before the Extraordinary Chambers, conduct the ensuing prosecutions and appeals.

The co-investigating judges

38. There would be two co-investigating judges: one Cambodian investigating judge and one international investigating judge. The international co-investigating judge would be appointed by Cambodia's Supreme Council of the Magistracy from a list of two nominees provided by the Secretary-General, the other being appointed as a reserve international co-investigating judge.

39. The two co-investigating judges would conduct judicial investigations on the basis of introductory charges submitted by the co-prosecutors. Where those investigations disclosed sufficient evidence, they would send the accused for trial before the Extraordinary Chambers.

The Pre-Trial Chamber

40. The two co-prosecutors would have to cooperate with a view to arriving at a common approach to prosecutions. In the event that they disagreed about whether or not to proceed with a prosecution, the prosecution would go ahead unless one of them decided to invoke machinery for the settlement of differences between them. That machinery would be the Pre-Trial Chamber.

41. The Pre-Trial Chamber would consist of three judges appointed by Cambodia's Supreme Council of the Magistracy and two judges appointed by the Supreme Council upon nomination by the Secretary-General. Decisions of the Pre-Trial

Chamber would be taken by an affirmative vote of four judges. If it proved impossible to obtain such a "supermajority", the prosecution would proceed.

42. The draft agreement contains analogous provisions regarding the settlement of differences between the two co-investigating judges regarding the conduct of judicial investigations.

43. The Pre-Trial Chamber would be convened, and its judges serve, only as and when needed.

The Office of Administration

44. The Extraordinary Chambers, the Pre-Trial Chamber, the Prosecutors' Office and the co-investigating judges would be serviced by an Office of Administration. That Office would have a Cambodian Director and an international Deputy Director. The Deputy Director would be appointed by the Secretary-General. The Deputy Director would be specifically responsible for the administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office. He or she would also be responsible for the recruitment of all international staff serving with those institutions or in the Office of Administration. While the Cambodian Director would be responsible for the overall management of the Office, his or her competence would not extend to matters that are subject to United Nations rules and procedures. The Director and the Deputy Director would cooperate to ensure that the Office functioned in an effective and efficient manner.

C. Jurisdiction of the Extraordinary Chambers

Subject-matter jurisdiction

45. The Extraordinary Chambers would have jurisdiction over the crimes defined in chapter II of Cambodia's national Law of 10 August 2001. Those crimes include the following crimes under international law: genocide; crimes against humanity; and grave breaches of the Geneva Conventions of 1949. They also include the following crimes under Cambodian law: homicide, torture and religious persecution. In addition, they include the following violations of international conventions recognized by Cambodia: the destruction of cultural property during armed conflict in circumstances prohibited by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; and crimes against internationally protected persons in circumstances prohibited by the Vienna Convention of 1961 on Diplomatic Relations.

Temporal jurisdiction

46. The jurisdiction of the Extraordinary Chambers would be limited to crimes committed during the period from 17 April 1975 to 6 January 1979.

Personal jurisdiction

47. The jurisdiction of the Extraordinary Chambers would be limited to crimes committed by senior leaders of Democratic Kampuchea and those who were most responsible for the crimes falling within the subject-matter and temporal jurisdiction of the Chambers.

D. Procedural law

48. The co-prosecutors, the co-investigating judges and the Extraordinary Chambers would follow the normal procedures laid down by Cambodian law. However, where Cambodian law did not deal with a question, or where there was uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there was a question regarding the consistency of such a rule with international standards, it would be possible to seek guidance in relevant procedural rules that have been established at the international level.

E. International standards of justice, fairness and due process

49. The draft agreement stipulates that the Extraordinary Chambers would have to exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the International Covenant on Civil and Political Rights. It is further stipulated that the rights of the accused which are enshrined in those articles of the Covenant would have to be respected at all stages of the criminal process. Specific mention is made in this regard of the right of accused persons to engage counsel of their own choosing, as guaranteed by article 14, paragraph 3 (d), of the Covenant. It is further envisaged that accused might engage, or be assigned, counsel who are not of Cambodian nationality. Such counsel, and likewise their Cambodian counterparts, would, in defending their clients, have to conduct themselves in accordance with the terms of the draft agreement, Cambodia's law on the bar and recognized standards and ethics of the legal profession.

50. The draft agreement also makes special mention of the right of the accused to a fair and public hearing, as guaranteed by article 14, paragraph 1, of the Covenant. In the interests of securing a fair and public hearing and ensuring the credibility of proceedings, it would be expected that representatives of States, the Secretary-General and international and national non-governmental organizations, as well as the news media, would at all times have access to, and be able to observe, the proceedings before the Extraordinary Chambers. Access might be denied only when strictly necessary in the opinion of the court and when publicity would prejudice the interests of justice.

F. Obligation of the United Nations to assist

51. The purpose of any agreement between the United Nations and Cambodia would be to set out an undertaking by the United Nations to help Cambodia establish the Extraordinary Chambers and support their sustained operation. It would also be a fundamental objective of any such agreement to spell out the forms of assistance that the United Nations would provide to that end. If the United Nations were to agree to provide such assistance, it is only to be expected that the instrument by which it assumed that obligation would specify the precise nature of the institution that it was undertaking to help set up and run. The draft agreement accordingly spells out how the Extraordinary Chambers would have to be structured and organized and how they would have to function, in order to receive assistance from the United Nations. As a corollary, if the Government were later to change the structure and organization of the Extraordinary Chambers so that they failed to

conform to the agreement, then the obligation of the United Nations to provide assistance under the agreement would cease to apply. The same would occur if the Government were to cause the Chambers to function in a manner that did not conform to the agreement. The draft agreement accordingly reserves the right of the United Nations to cease to provide assistance in such an eventuality.

V. Next steps

52. The current status of the draft agreement is as follows. The Legal Counsel, as my representative, and Senior Minister Sok An, as the representative of the Government of Cambodia, have initialled the draft agreement. It should be emphasized that they have not signed it. Rather, by initialling the draft agreement, they have indicated that it is the text that they have elaborated in order to provide their respective authorities with a single and certain text for their review and consideration. It is now for the General Assembly, on the one hand, and the relevant constitutional authorities of Cambodia, on the other, to decide whether or not to conclude an agreement and, if so, whether to do so on the basis of the text that has been initialled or whether that text should be modified in any regard before it is signed. The fact that the text has been initialled therefore does not exclude the possibility that the parties may decide that further negotiations are needed on certain issues before an agreement is finally concluded.

53. Article 30 of the draft agreement provides that, to be binding on the parties, the agreement must be approved by the General Assembly and ratified by the relevant constitutional authorities of Cambodia. Should the General Assembly be of the opinion that it is desirable that an agreement be concluded between the United Nations and the Government of Cambodia on the basis of the draft that is annexed to the present report, it would have to adopt a decision approving the annexed draft. In the event that the General Assembly approved that draft, I would then proceed to sign the agreement for the United Nations.

54. Article 32 of the draft agreement provides that, following its approval by the General Assembly and its ratification by the relevant constitutional authorities of Cambodia, the draft agreement would enter into force once both parties had notified each other in writing that the legal requirements for entry into force had been complied with. When I would provide such notification would depend upon the decision of the General Assembly on the financial mechanism which should be used to finance the international assistance that the United Nations would provide under the draft agreement. This question is addressed in section VI, B, below.

VI. Practical implementation

55. The draft agreement, if accepted, would establish mutual obligations of the United Nations and the Government of Cambodia with regard to appointments of the judges of the Extraordinary Chambers, the co-prosecutors, the co-investigating judges, the judges of the Pre-Trial Chamber and the Director, Deputy Director and staff of the Office of Administration. It would also set out, in articles 14, 15, 16 and 17, the parties' obligations regarding the provision of premises, the defrayment of the salaries and emoluments of officials and personnel and the defrayment of the operating expenses of the Extraordinary Chambers and their associated institutions.

A. Estimated requirements

56. Notwithstanding that not all parameters are currently available, it is estimated that an amount in excess of US$ 19 million would be required for the establishment and operation of the Extraordinary Chambers, the Prosecutors' Office, the co-investigating judges, the Pre-Trial Chamber and the Office of Administration over the course of three years — three years being the period during which it is assumed that all trials and appeals would be completed once the Prosecutors' Office had commenced operations.

Personnel

57. Under the draft agreement, the United Nations would be responsible for the salaries and emoluments of the international judges, including the international co-investigating judge, the international co-prosecutor, the Deputy Director of the Office of Administration and the international personnel required by the Chambers, the co-investigating judges, the Prosecutors' Office and the Office of Administration.

58. The Secretary-General would not appoint the international judges, the international co-prosecutor and the international co-investigating judge. Cambodia's Supreme Council for the Magistracy would make appointments from a list of nominees submitted by the Secretary-General. Accordingly, under normal circumstances it would be difficult for these officials to be considered officials of the United Nations. However, as the United Nations would be responsible for the payment of their salaries and emoluments, it would be highly desirable that they possess the status of officials of the United Nations for the purposes of their terms and conditions of service.

59. Consequently, should the General Assembly decide to approve the draft agreement, it is recommended that a specific decision be taken to deem these appointees to be officials of the United Nations for the purposes of their terms and conditions of service.

60. The establishment and operation of the Extraordinary Chambers would involve a phased-in approach based on the evolution of the legal process — that is, influenced by progression through the investigation, trial and appeal stages. For present purposes, it has been assumed that all trials and appeals would be completed within a period of three years after the co-prosecutors had commenced their operations. In this connection, should the draft agreement be approved, efforts would be made to expedite the establishment of the Office of the Prosecution and the Office of Administration. Preliminary estimates indicate that for the three-year period, total personnel costs would amount to $18.2 million (gross).

61. In the first year of operation, it is estimated that resources amounting to $4.2 million (gross) would provide for 80 posts relating to the phased establishment of the Extraordinary Chambers and the co-investigating judges and the full establishment of the Office of the Prosecution and the Office of Administration. Those offices would continue at full capacity throughout the three years of operation.

62. The requirements are expected to peak in the second year of operation when the Extraordinary Chambers and the co-investigating judges would be fully

operational. The Appeals Chamber would, however, only be operational for less than the full year. In this connection, the estimated resources would amount to $7.8 million (gross) and provide for a complement of 91 posts.

63. By the third year, it is expected that the Trial Chamber and the co-investigating judges would be winding down or would have completed their work. The Appeals Chamber, on the other hand, would operate throughout the year. Accordingly, the estimated resource requirements for the third year would decrease to the level of $6.2 million (gross) and provide for a complement of 74 posts.

Premises

64. Under article 14 of the draft agreement, it would be the responsibility of the Government of Cambodia to provide at its expense the premises for the Extraordinary Chambers, the Prosecutors' Office, the co-investigating judges, the Pre-Trial Chamber and the Office of Administration. During its visit to Phnom Penh, the United Nations team visited the three premises which the Government had suggested would be suitable for these purposes. They consisted of the Chaktomuk Theatre building (envisaged by the Government as the possible site for the courtroom), a municipal building and the Ministry of Justice building. The latter two premises would require some measure of refurbishment to meet requirements. In accordance with article 17 (f) of the draft agreement, the responsibility for, and the costs of, internal partitioning and minor improvements for purposes of creating the relevant office accommodation would be borne by the United Nations.

65. At the conclusion of the visit to Phnom Penh, there was no definitive position as to the premises to be provided and the Government of Cambodia continues to weigh the options, including the possibility of constructing new premises. Accordingly, no provision has been included in these estimates for any ensuing costs for the United Nations relating to internal partitioning and minor improvements of the premises that might eventually be identified.

Furniture and equipment

66. As is the case with the phased deployment of personnel, the acquisition of furniture and equipment for the establishment of the Extraordinary Chambers and their associated institutions would follow the same pattern. Resource requirements over the three years are estimated at $372,300. This amount would provide for the acquisition of: office furniture and storage facilities; office automation and data-processing equipment, such as LAN servers, desktop computers, photocopiers, scanners and facsimile machines; communications equipment (cell phones and telephones); and vehicles. It is expected that the bulk of the furniture and equipment would be acquired during the first year of operation ($350,000), with the balance during the second year ($22,300). It is not expected that additional equipment would be required during the third year of operation.

Travel

67. Provision has been made in the current preliminary estimates for the travel between New York and Phnom Penh at least once a year of the international judges of the Pre-Trial Chamber (who, it is envisaged, would be needed for 10 days each year) and the Deputy Director of Administration (consultations at Headquarters and

appearance before legislative bodies). This would amount to approximately $31,500 per year, or a total of $94,500 for the three-year period.

68. At this time no provision has been made for domestic travel or, as indicated under article 17 (d) of the draft agreement, witnesses' travel from within Cambodia and from abroad.

General operating expenses

69. A preliminary provision for the three years of operation of the Extraordinary Chambers and their associated institutions amounting to approximately $324,900 has been included in these preliminary estimates for miscellaneous operating needs, including insurance, oil and fuel, maintenance of vehicles, etc.

70. However, the costs of utilities and services necessary for the operation of the Extraordinary Chambers and the related institutions, which would be the subject of a separate agreement between the United Nations and Cambodia, have not been included in the present estimates.

71. Provisions for the remuneration of defence counsel who might be assigned to indigent accused and the costs of prosecutorial and investigative activities, supplies and materials, printing, miscellaneous contractual services and general temporary assistance also have not been included.

B. Financial mechanism

72. In paragraph 9 of resolution 57/228, the General Assembly requested me to include in the present report recommendations on "the amount of voluntary contributions of funds, equipment and services to the Extraordinary Chambers, inter alia, through the offer of expert personnel, that may be needed from States, intergovernmental organizations and non-governmental organizations".

73. On 22 November 2002, at the time the General Assembly was considering the draft of its future resolution 57/228, I addressed a letter to the President of the Assembly (A/57/626) and indicated that it was my intention to include information on the financing needs of the Extraordinary Chambers in the report that I would submit to the General Assembly in accordance with operative paragraph 7 of the draft resolution. I added that the report would also include a proposal on the method of funding, including through assessed contributions.

74. It is my view that an operation of this nature, mandated by Member States, would constitute an expense of the Organization under Article 17 of the Charter of the United Nations and should be financed from assessed contributions. A financial mechanism based on voluntary contributions would not provide the assured and continuous source of funding that would be needed to make it possible to appoint judges, the international co-prosecutor, the international co-investigating judge and the Deputy Director of Administration, to contract the services of administrative and support staff and to purchase the necessary equipment. Nor would it provide a secure basis for the conduct of investigations, prosecutions and trials.

75. The operation of a court should not be left to the vagaries of voluntary contributions. It could well be said that courts, as a matter of constitutional

principle, should be financed by taxation or, at the international level, through the analogous mechanism of assessed contributions.

76. Moreover, experience with the Special Court for Sierra Leone has proved that, if the assistance that the United Nations is to provide is to be funded from voluntary contributions, it would probably be more than a year before sufficient contributions were received to make that possible. In this connection, I cannot but recall that it was the expressed wish of the General Assembly in resolution 57/228 that the Extraordinary Chambers be established as early as possible and that they begin to function promptly. Otherwise, the opportunity of bringing those responsible to justice might be lost. In my view, the only way to ensure that this does not happen is financing through assessed contributions. This would also provide a viable and sustainable financial mechanism, affording secure and continuous funding. It would still be open to States, intergovernmental organizations and non-governmental organizations to make voluntary contributions for ad hoc purposes.

77. If it is nevertheless the intention of the General Assembly that the assistance which the United Nations would provide to the Extraordinary Chambers under any agreement with the Government of Cambodia should be financed from voluntary contributions, the process of setting up the Extraordinary Chambers — of appointing and hiring personnel, procuring equipment and so on — could only be initiated once sufficient money was in place to fund the necessary personnel and the operations of the Chambers for a sustained period of time.

78. I am aware that a number of States have informally made statements to the effect that I would be able to depend on receiving the necessary voluntary contributions quickly and in full, to fund the United Nations contribution to the costs of the Extraordinary Chambers. However, I received similar informal assurances of support in the case of the Special Court for Sierra Leone.

VII. Conclusion

79. The present report describes the steps that I took to resume negotiations with the Government of Cambodia for an agreement on the establishment of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea. It also describes the draft agreement which was finalized as a result of those negotiations. Further, it explains why, while that text is a considerable improvement over the one which had been under discussion during the previous negotiations, doubts might still remain as to whether it would ensure the credibility of the Extraordinary Chambers, given the precarious state of the judiciary in Cambodia.

80. Should the General Assembly be of the view that the United Nations should proceed to conclude an agreement with the Government of Cambodia based upon that draft, the present report describes the steps that it would have to take for that purpose. Needless to say, I would spare no effort to execute any such agreement.

81. Were the agreement to enter into force, it would be essential, in my view, that the United Nations assist in ensuring that the Extraordinary Chambers function in a manner that conforms to the agreement and complies with the international standards mentioned above. I would therefore propose that, in that eventuality, the

Organization should remain engaged in the process of overseeing the implementation of the draft agreement.

82. The present report goes on to describe the requirements of the Extraordinary Chambers and associated bodies in terms of funds, personnel and services. It also draws attention to the need for a viable financial mechanism to sustain the assistance that the United Nations would provide to the Extraordinary Chambers for the duration of their operation. It concludes that assessed contributions represent the only such mechanism that would be viable and sustainable and that would ensure the early establishment of the Extraordinary Chambers and the prompt commencement of their operations.

Notes

[1] General Assembly resolution 57/228, seventh preambular paragraph, see also the eighth preambular paragraph. In the latter paragraph, the General Assembly welcomed, in general terms, the promulgation on 10 August 2001 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, which gives expression to this conception. In the same paragraph, the Assembly also specifically noted with appreciation the fact that the Law provided for international assistance for the establishment and operation of the Extraordinary Chambers to be provided through the United Nations.

[2] See paragraphs 2 and 3 of the resolution. See also the eighth preambular paragraph, in which the General Assembly specifically endorsed chapter I ("General provisions") and chapter II ("Competence") of Cambodia's national Law, which specify the personal and subject-matter jurisdiction of the Extraordinary Chambers.

[3] See paragraph 4 (b) of the resolution. See also the tenth preambular paragraph, in which the General Assembly welcomed the discussions that I had with the Government of Cambodia following my statement of 8 February 2002. During the course of those discussions, Prime Minister Hun Sen informed me, in a letter dated 28 June 2002, that he was prepared to simplify the three-tier structure that was envisaged for the Extraordinary Chambers in Cambodia's Law, by reducing the number of instances from three to two.

[4] See paragraph 4 (a) of the resolution; see also paragraph 6.

[5] See paragraph 5 of the resolution. International standards of justice, fairness and due process of law, as set out in article 14 of the International Covenant on Civil and Political Rights, include the right to a fair hearing by an independent and impartial tribunal. Paragraphs 4 (a) and 6 of the resolution are therefore also to be understood as making this condition one that any agreement would have to respect.

In addition to article 14 of the Covenant, the international standards to which paragraph 5 of the resolution refers are also set out in the Universal Declaration of Human Rights (article 10), the Basic Principles on the Role of Lawyers and the Guidelines on the Role of Prosecutors, both adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, and the Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly in its resolutions 40/32 of 29 November *1985 and 40/146 of 13 December 1985.*

[6] See paragraphs 1, 9 and 10 of the resolution; see also the fourth preambular paragraph.

[7] See paragraph 1 of the resolution.

[8] General Assembly resolution 57/225, sect. II, para. 2.

[9] See, most recently, A/57/230 and E/CN.4/2003/114.

Annex

DRAFT AGREEMENT **17 March 2003**
BETWEEN THE UNITED NATIONS
AND THE ROYAL GOVERNMENT OF CAMBODIA
CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

WHEREAS the General Assembly of the United Nations, in its resolution 57/228 of 18 December 2002, recalled that the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole;

WHEREAS in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security;

WHEREAS the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979;

WHEREAS prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, "the Secretary-General") and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea;

WHEREAS by its resolution 57/228, the General Assembly welcomed the promulgation of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations on the establishment of the Extraordinary Chambers consistent with the

provisions of the said resolution, so that the Extraordinary Chambers may begin to function promptly;

WHEREAS the Secretary-General and the Royal Government of Cambodia have held negotiations on the establishment of the Extraordinary Chambers;

NOW THEREFORE the United Nations and the Royal Government of Cambodia have agreed as follows:

Article 1
Purpose

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

Article 2
The Law on the Establishment of Extraordinary Chambers

1. The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea" (hereinafter: "the Law on the Establishment of the Extraordinary Chambers"), as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.

2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The

Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

Article 3
Judges

1. Cambodian judges, on the one hand, and judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations (hereinafter: "international judges"), on the other hand, shall serve in each of the two Extraordinary Chambers.

2. The composition of the Chambers shall be as follows:

a. The Trial Chamber: three Cambodian judges and two international judges;

b. The Supreme Court Chamber, which shall serve as both appellate chamber and final instance: four Cambodian judges and three international judges.

3. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. In the overall composition of the Chambers due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

5. The Secretary-General of the United Nations undertakes to forward a list of not less than seven nominees for international judges from which the Supreme Council of the Magistracy shall appoint five to serve as judges in the two Chambers. Appointment

of international judges by the Supreme Council of the Magistracy shall be made only from the list submitted by the Secretary-General.

6. In the event of a vacancy of an international judge, the Supreme Council of the Magistracy shall appoint another international judge from the same list.

7. The judges shall be appointed for the duration of the proceedings.

8. In addition to the international judges sitting in the Chambers and present at every stage of the proceedings, the President of a Chamber may, on a case-by-case basis, designate from the list of nominees submitted by the Secretary-General, one or more alternate judges to be present at each stage of the proceedings, and to replace an international judge if that judge is unable to continue sitting.

Article 4
Decision-making

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a. A decision by the Trial Chamber shall require the affirmative vote of at least four judges;

b. A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.

Article 5
Investigating judges

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.

2. The co-investigating judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to such a judicial office.

3. The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. In addition to the list of nominees provided for in Article 3, paragraph 5, the Secretary-General shall submit a list of two nominees from which the Supreme Council of the Magistracy shall appoint one to serve as an international co-investigating judge, and one as a reserve international co-investigating judge.

6. In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge.

7. The co-investigating judges shall be appointed for the duration of the proceedings.

Article 6
Prosecutors

1. There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as co-prosecutors. They shall be responsible for the conduct of the prosecutions.

2. The co-prosecutors shall be of high moral character, and possess a high level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.

3. The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

4. The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. The Secretary-General undertakes to forward a list of two nominees from which the Supreme Council of the Magistracy shall select one international co-prosecutor and one reserve international co-prosecutor.

6. In case there is a vacancy or a need to fill the post of the international co-prosecutor, the person appointed to fill this post must be the reserve international co-prosecutor.

7. The co-prosecutors shall be appointed for the duration of the proceedings.

8. Each co-prosecutor shall have one or more deputy prosecutors to assist him or her with prosecutions before the Chambers. Deputy international prosecutors shall be appointed by the international co-prosecutor from a list provided by the Secretary-General.

Article 7
Settlement of differences between the co-investigating judges or the co-prosecutors

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.

3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

Article 8
Office of Administration

1. There shall be an Office of Administration to service the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office.

2. There shall be a Cambodian Director of this Office, who shall be appointed by the Royal Government of Cambodia. The Director shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

3. There shall be an international Deputy Director of the Office of Administration, who shall be appointed by the Secretary-General. The Deputy Director shall be responsible for the recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges, the Prosecutors' Office and the Office of Administration. The United Nations and the Royal Government of Cambodia agree that, when an international Deputy Director has been appointed by the Secretary-General, the assignment of that person to that position by the Royal Government of Cambodia shall take place forthwith.

4. The Director and the Deputy Director shall cooperate in order to ensure an effective and efficient functioning of the administration.

Article 9
Crimes falling within the jurisdiction of the Extraordinary Chambers

The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

Article 10
Penalties

The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment.

Article 11
Amnesty

1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.

2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.

Article 12
Procedure

1. The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

Article 13
Rights of the accused

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.

2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

Article 14
Premises

The Royal Government of Cambodia shall provide at its expense the premises for the co-investigating judges, the Prosecutors' Office, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration. It shall also provide for such utilities, facilities and other services necessary for their operation that may be mutually agreed upon by separate agreement between the United Nations and the Government.

Article 15
Cambodian personnel

Salaries and emoluments of Cambodian judges and other Cambodian personnel shall be defrayed by the Royal Government of Cambodia.

Article 16
International personnel

Salaries and emoluments of international judges, the international co-investigating judge, the international co-prosecutor and other personnel recruited by the United Nations shall be defrayed by the United Nations.

Article 17
Financial and other assistance of the United Nations

The United Nations shall be responsible for the following:

a. remuneration of the international judges, the international co-investigating judge, the international co-prosecutor, the Deputy Director of the Office of Administration and other international personnel;

b. costs for utilities and services as agreed separately between the United Nations and the Royal Government of Cambodia;

c. remuneration of defence counsel;

d. witnesses' travel from within Cambodia and from abroad;

e. safety and security arrangements as agreed separately between the United Nations and the Government;

f. such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.

Article 18
Inviolability of archives and documents

The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration, and in general all documents and materials made available, belonging to or used by them,

wherever located in Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

Article 19
Privileges and immunities of international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration

1. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

a. personal inviolability, including immunity from arrest or detention;

b. immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

c. inviolability for all papers and documents;

d. exemption from immigration restrictions and alien registration;

e. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.

2. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 20
Privileges and immunities of Cambodian and international personnel

1. Cambodian judges, the Cambodian co-investigating judge, the Cambodian co-prosecutor and other Cambodian personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded:

   a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;

   b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;

   c. immunity from immigration restrictions;

   d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The United Nations and the Royal Government of Cambodia agree that the immunity granted by the Law on the Establishment of the Extraordinary Chambers in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement will apply also after the persons have left the service of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

Article 21
Counsel

1. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Royal Government of Cambodia to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.

2. In particular, the counsel shall be accorded:

   a. immunity from personal arrest or detention and from seizure of personal baggage;

   b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

   c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel. Such immunity shall continue to be accorded to them after termination of their functions as a counsel of a suspect or accused.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

Article 22
Witnesses and experts

Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, or the co-prosecutors shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions.

Article 23
Protection of victims and witnesses

The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the identity of a victim or witness.

Article 24
Security, safety and protection of persons referred to in the present Agreement

The Royal Government of Cambodia shall take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement. The United Nations and the Government agree that the Government is responsible for the security of all accused, irrespective of whether they appear voluntarily before the Extraordinary Chambers or whether they are under arrest.

Article 25
Obligation to assist the co-investigating judges, the co-prosecutors and the Extraordinary Chambers

The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:

a. identification and location of persons;

b. service of documents;

c. arrest or detention of persons;

d. transfer of an indictee to the Extraordinary Chambers.

Article 26
Languages

1. The official language of the Extraordinary Chambers and the Pre-Trial Chamber is Khmer.

2. The official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.

3. Translations of public documents and interpretation at public hearings into Russian may be provided by the Royal Government of Cambodia at its discretion and expense on condition that such services do not hinder the proceedings before the Extraordinary Chambers.

Article 27
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Extraordinary Chambers, a phased-in approach shall be adopted for their establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Extraordinary Chambers, the judges, the co-investigating judges and the co-prosecutors will be appointed along with investigative and prosecutorial staff, and the process of investigations and prosecutions shall be initiated.

3. The trial process of those already in custody shall proceed simultaneously with the investigation of other persons responsible for crimes falling within the jurisdiction of the Extraordinary Chambers.

4. With the completion of the investigation of persons suspected of having committed the crimes falling within the jurisdiction of the Extraordinary Chambers, arrest warrants shall be issued and submitted to the Royal Government of Cambodia to effectuate the arrest.

5. With the arrest by the Royal Government of Cambodia of indicted persons situated in its territory, the Extraordinary Chambers shall be fully operational, provided

that the judges of the Supreme Court Chamber shall serve when seized with a matter. The judges of the Pre-Trial Chamber shall serve only if and when their services are needed.

Article 28
Withdrawal of cooperation

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.

Article 29
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of the present Agreement shall be settled by negotiation, or by any other mutually agreed upon mode of settlement.

Article 30
Approval

To be binding on the parties, the present Agreement must be approved by the General Assembly of the United Nations and ratified by Cambodia. The Royal Government of Cambodia will make its best endeavours to obtain this ratification by the earliest possible date.

Article 31
Application within Cambodia

The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.

Article 32
Entry into force

The present Agreement shall enter into force on the day after both parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Done at [place] on [day, month] 2003 in two copies in the English language.

For the United Nations

For the Royal Government of Cambodia